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No. 84-1098

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GENERAL MOTORS CORPORATION,
Petitioner,

v.

LEE M. THOMAS, ADMINISTRATOR OF THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE MOTOR VEHICLE MANUFACTURERS ASSOCIATION AS AMICUS CURIAE

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April 9, 1985

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	2
STATEMENT	2
REASONS FOR GRANTING THE WRIT	4
I. The Court Should Review the Decision Below Because It Authorizes a Combined Administrative and Judicial Review Procedure That Violates the Requirements of Due Process of Law	5
II. The Court Should Review the Decision Below Because the Lower Court Ignored the APA in Applying the *Chevron* Standard of Review to a Rule That It Characterized As Interpretative	9
III. The Court Should Review the Decision Below Because the EPA Violated the APA and the Clean Air Act in Denying Members of the Regulated Industry Notice of and Opportunity To Comment on a Rule Enlarging Their Recall Obligations	15
CONCLUSION	19

TABLE OF AUTHORITIES

Cases	Page
Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978)	9
Baldwin v. Hale, 68 U.S. (1 Wall.) 223 (1854)	6
Batterton v. Francis, 432 U.S. 416 (1977)	13
Bell Lines, Inc. v. United States, 263 F. Supp. 40 (S.D. W. Va. 1967)	12
Buckeye Power, Inc. v. EPA, 481 F.2d 162 (6th Cir. 1973)	14
Capitano v. Secretary of Health and Human Services, 732 F.2d 1066 (2d Cir. 1984)	13
Chemical Manufacturers Ass'n v. NRDC, Inc., 53 U.S.L.W. 4193 (U.S. February 27, 1985) (No. 83-1013)	11
Cherry v. Mathews, 419 F. Supp. 922 (D.D.C. 1976)	14
Chevron, U.S.A., Inc. v. NRDC, Inc., 104 S. Ct. 2778 (1984)	*passim*
Chrysler Corp. v. EPA, 600 F.2d 904 (D.C. Cir. 1979)	2
Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971)	13
CPSC v. GTE Sylvania, Inc., 447 U.S. 102 (1980)	13
Davies Warehouse Co. v. Bowles, 321 U.S. 144 (1944)	13
Detroit Edison Co. v. United States Environmental Protection Agency, 496 F.2d 244 (6th Cir. 1974)	14
FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27 (1981)	11
Fuentes v. Shevin, 407 U.S. 67 (1972)	5, 6
General Electric Co. v. Gilbert, 429 U.S. 125 (1976)	11, 13, 14
General Motors Corp. v. Ruckelshaus, 724 F.2d 979 (D.C. Cir. 1983)	16
General Motors Corp. v. Ruckelshaus, 742 F.2d 1561 (D.C. Cir. 1984) (en banc)	*passim*
Harrison v. PPG Industries, Inc., 446 U.S. 578 (1980)	9
Lewis-Mota v. Secretary of Labor, 469 F.2d 478 (2d Cir. 1972)	14

TABLE OF AUTHORITIES—Continued

	Page
Mathews v. Eldridge, 424 U.S. 319 (1976)	5
Mayburg v. Secretary of Health and Human Services, 740 F.2d 100 (1st Cir. 1984)	13
Morton v. Ruiz, 415 U.S. 199 (1974)	13
Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29 (1983)	2
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)	6
NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969)	12
Skidmore v. Swift & Co., 323 U.S. 134 (1944)	11, 12, 13, 14, 15
United States Steel Corp. v. United States Environmental Protection Agency, 444 U.S. 1035 (1980)	6
Vermont Yankee Nuclear Power Corp. v. NRDC, Inc., 435 U.S. 519 (1978)	5
Weyerhaeuser Co. v. Costle, 590 F.2d 1011 (D.C. Cir. 1978)	14
Yakus v. United States, 321 U.S. 414 (1944)	6
Constitution, Statutes and Regulations	
U.S. Constitution, Amendment V	4, 5, 8, 12
5 U.S.C. § 553(b)(A)	6
5 U.S.C. § 553(b)(B)	6
5 U.S.C. § 706	12
42 U.S.C. § 7521(d)	2, 16
42 U.S.C. § 7541(c)(1)	2, 16
42 U.S.C. § 7607(b)	3
42 U.S.C. § 7607(b)(1)	7
42 U.S.C. § 7607(b)(2)	8
42 U.S.C. § 7607(d)(1)	6
42 U.S.C. § 7607(d)(1)(J)	17
42 U.S.C. § 7607(d)(1)(L)	17
42 U.S.C. § 7607(d)(8)	8
42 U.S.C. § 7607(e)	8
Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 305, 91 Stat. 685, 772-77, 42 U.S.C. § 7607(d)(1)-(7)	16
40 C.F.R. § 85.1803 App. A (1984)	3

TABLE OF AUTHORITIES—Continued

Miscellaneous	Page
Administrative Procedure Act: Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. (1946)	12, 13
Conference Report No. 1783, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S. Code Cong. & Ad. News 5374	16
39 Fed. Reg. 44370 (1974)	7
43 Fed. Reg. 27736 (1978)	11
45 Fed. Reg. 36396 (1980)	3, 8
49 Fed. Reg. 52170 (1983)	7
General Motors Corporation's Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit (filed January 7, 1985)	10, 15
H.R. Rep. No. 294, 95th Cong., 1st Sess. (1977), *reprinted in* 1977 U.S. Code Cong. & Ad. News 1077	8, 17, 18
H.R. Conference Rep. No. 564, 95th Cong., 1st Sess. (1977), *reprinted in* 1977 U.S. Code Cong. & Ad. News 1502	8, 17
Report of the Committee on Administrative Procedure Appointed by the Attorney General, Administrative Procedures in Government Agencies (1941)	13

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BRIEF FOR THE MOTOR VEHICLE MANUFACTURERS ASSOCIATION AS AMICUS CURIAE

On behalf of certain of its member companies, the Motor Vehicle Manufacturers Association ("MVMA") submits this brief amicus curiae in support of General Motors Corporation's petition for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit.[1] That decision is reprinted in the appendices to the petition and is reported at 742 F.2d 1561.

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[1] By letters filed with the Clerk of the Court, both General Motors Corporation ("GM") and the Administrator of the Environmental Protection Agency ("EPA") consented to the filing of this brief.

INTEREST OF AMICUS CURIAE

MVMA is an incorporated, not-for-profit trade association of major automobile and truck manufacturers.[2] Its members have a substantial interest in this Court's review of the decision below because (1) the EPA rule at issue dramatically increases their recall and repair obligations, (2) the procedures used by the agency and the reviewing court denied MVMA members an adequate opportunity to challenge the rule, which threatens to bind them forever, and (3) MVMA member companies, regulated under many health and safety laws administered by federal agencies,[3] have a broad interest in the administrative law questions presented by the petition.

STATEMENT

The issues in this case arise out of a dispute between GM and the EPA over the proper scope of a recall of certain 1975 Cadillacs. Under section 207(c)(1) of the Clean Air Act, EPA has authority to order the recall and repair, at the manufacturer's expense, of vehicles failing to conform to prescribed emissions standards during their "useful life."[4] GM contended that this authority did not

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[2] MVMA files this brief on behalf of its following members: AM General Corporation, American Motors Corporation, Chrysler Corporation, Ford Motor Company, International Harvester Company, M.A.N. Truck and Bus Corporation, PACCAR Inc., Volkswagen of America, Inc., and Volvo North America Corporation. The petitioner General Motors Corporation is also a member of MVMA.

[3] *See, e.g., Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983) (concerning passive restraint regulations issued under the National Traffic and Motor Vehicle Safety Act); *Chrysler Corp. v. EPA*, 600 F.2d 904 (D.C. Cir. 1979) (concerning noise regulations issued under the Noise Control Act).

[4] 42 U.S.C. § 7541(c)(1) (1982). Section 202(d) of the Clean Air Act, *id.* § 7521(d), sets forth guidelines for determining the useful life of various types of vehicles and is incorporated by reference in section 207(c)(1).

permit EPA to order the recall and repair of cars that exceeded the age or mileage defining their "useful life."

To the industry's surprise, EPA enforced its contrary view on May 30, 1980, by issuing what it called an interpretative rule. The rule provided that, when a recall is ordered, the manufacturer must repair at its expense "all properly maintained and used vehicles which experienced the nonconformity during their useful lives *regardless of their age or mileage at the time of repair.*" [5] EPA declared the rule to be "a final rule effective upon publication" without any prior notice of the rulemaking and without any opportunity for comments from the public.[6] EPA also pronounced the rule "a 'nationally applicable regulation' under section 307(b)(1) of the Clean Air Act," [7] thus specifically invoking the preclusive review provision of the statute, which forbids any challenge to such EPA action other than by appeal to the District of Columbia Circuit within sixty days.[8] The agency immediately applied the May 30 rule to the recall of GM's 1975 Cadillacs.

On appeal by GM, the United States Court of Appeals for the District of Columbia Circuit reviewed EPA's rule under the highly deferential standard set out in *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 104 S. Ct. 2778 (1984). Under *Chevron*, appellate inquiry is limited to whether an agency's construction of a statute is "sufficiently reasonable" to be accepted.[9] Applying that test, the court below sustained the May 30 rule. It erroneously failed to exercise its own independent judgment on the merits of the rule as an interpretation of the Clean Air Act and

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[5] 40 C.F.R. § 85.1803 App. A (emphasis added).

[6] 45 Fed. Reg. 36396, 36398 (1980).

[7] *Id.*

[8] *See* 42 U.S.C. § 7607(b) (1982); Part I *infra*.

[9] *See* 742 F.2d at 1567 (citations omitted).

on the adequacy of the procedures used by EPA during the rulemaking process.

REASONS FOR GRANTING THE WRIT

The Court should review the decision below for two reasons. First, parties affected by the May 30 rule have been deprived of procedural rights protected by the Fifth Amendment to the Constitution. EPA substantially extended the recall obligations of vehicle manufacturers with a final regulation protected by the preclusive review provision of the Clean Air Act, even though the agency had provided no prior notice of the rulemaking and no opportunity to comment on the rule. The lower court then denied the manufacturers an effective opportunity to participate during appellate review by testing the May 30 rule against a deferential standard that imposed no meaningful check on the substantive or procedural decisions made by the agency. As Part I of this brief shows, MVMA's position is that this Court's review is necessary because the Constitution does not permit a combination of agency and judicial action that produces an onerous, binding regulation through a process that so totally excludes affected members of the public.

As we show in Parts II and III of this brief, the constitutional defect resulted from two errors of statutory interpretation. One was the decision of the appellate court to ignore the requirements of the Administrative Procedure Act ("APA") and use the deferential *Chevron* standard to review an interpretative rule issued without prior notice or comment. The other was the EPA's violation of both the APA and the Clean Air Act in failing to follow notice-and-comment procedures before issuing the May 30 rule.

The second reason that this Court should review the decision below is that it has far-reaching, adverse consequences for public participation in the administrative process. As the Court has recognized, administrative law decisions of the District of Columbia Circuit "serve as

precedent for many more proceedings for judicial review of agency actions than would the decision of another Court of Appeals." [10] Allowing the decision below to stand therefore will sanction and encourage, in disregard of the procedural rights of the public, agency use of "interpretative rules" in conjunction with an unacceptably deferential standard of judicial review.

I. THE COURT SHOULD REVIEW THE DECISION BELOW BECAUSE IT AUTHORIZES A COMBINED ADMINISTRATIVE AND JUDICIAL REVIEW PROCEDURE THAT VIOLATES THE REQUIREMENTS OF DUE PROCESS OF LAW.

Whether labeled an "interpretative" or "legislative" rule, EPA's May 30 rule imposed onerous new requirements on all vehicle manufacturers subject to the recall provision of the Clean Air Act. Because of the procedures followed by the agency and uncritically embraced by the court below, these manufacturers had no meaningful opportunity to present their views regarding the EPA rule to either the agency or the reviewing court. That fundamental unfairness was aggravated by EPA's declaration that the preclusive review provisions of the Clean Air Act will bar vehicle manufacturers from challenging the rule in any future enforcement proceeding directed at them. The cumulative effect was a denial of the due process of law guaranteed by the Fifth Amendment.

The purpose of the Due Process Clause "is to protect [the] use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of pr[illegible]ty." [11] In the rulemaking context, due process requires that affected persons have a reasonable opportunity to present their views to the

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[10] *Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 535-37 n.14 (1978).

[11] *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972); *see Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

agency or reviewing court.[12] A meaningful opportunity to be heard can be afforded by allowing affected persons to present comments to the agency before it adopts the rule or, if prior notice and opportunity to comment are not afforded, by making the rule subject to plenary independent judicial scrutiny. Neither opportunity was provided here.

The EPA's invocation of the "interpretative rule" exception to the notice-and-comment requirements of the APA and the Clean Air Act[13] completely excluded the public from agency deliberations. EPA unexpectedly published the rule as a final, binding regulation during its recall dispute with GM and denied MVMA member companies any timely opportunity to persuade the agency that the May 30 rule was unauthorized by statute, impractical, or otherwise deficient. Not only did the agency fail to seek comments before issuing the rule, it did not even request public comment after publication.[14] The

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[12] *See Yakus v. United States*, 321 U.S. 414, 433 (1944) (persons affected by agency action must be given "a reasonable opportunity to be heard" at some point in the administrative process). *See also, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) ("Parties whose rights are to be affected are entitled to be heard") (quoting *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1854)).

[13] The APA exempts interpretative rules from notice-and-comment procedures, 5 U.S.C. § 553(b)(A) (1982), and the Clean Air Act incorporates the exemption, 42 U.S.C. § 7607(d)(1) (1982).

[14] Thus this case differs from those occasions when, to meet an emergency, EPA uses the good cause exception to notice-and-comment rulemaking, 5 U.S.C. § 553(b)(B) (1982), and then solicits comments after issuing the rule. *See, e.g., United States Steel Corp. v. United States Environmental Protection Agency*, 444 U.S. 1035, 1036 (1980) (Rehnquist, J., dissenting from the denial

public was excluded even though the rule had, and was intended to have, a substantial impact on manufacturers' recall obligations and addressed conflicting policy considerations left unresolved by Congress.[15] In so excluding the public, EPA ignored a lesson of its own experience, which is that notice-and-comment rulemaking proceedings frequently result in improved regulations, reflecting the suggestions of affected manufacturers and other interested parties.[16]

The D.C. Circuit compounded the adverse effects of EPA's action by improperly applying the deferential *Chevron* standard of review. Using *Chevron* to review the May 30 rule denied vehicle manufacturers an effective opportunity to challenge in court the substantive or procedural deficiencies of a rule issued without notice or comment. The court below did not seriously test EPA's decision to use the "interpretative rule" exception to notice-and-comment rulemaking and then accepted the substance of the May 30 rule as a not unreasonable method of effectuating public policy goals.

The threatened operation of the preclusive judicial review section of the Clean Air Act exacerbates the unfairness that results from the proceedings below. Section 307(b) provides for exclusive judicial review of "nationally applicable regulations" in the D.C. Circuit within sixty days of publication in the Federal Register.[17] Such

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of certiorari and noting that EPA amended its action in light of subsequent comments).

[15] *See* pages 15-16 *infra*.

[16] Issuing regulations on the useful life of certain engines, EPA recently said that the final rules were "shaped considerably by the public participation during the course of the rulemaking." 49 Fed. Reg. 52170, 52175, 52179 (1983). *See also* 39 Fed. Reg. 44370 (1974) (issuing final recall rules and discussing comments received from the public).

[17] 42 U.S.C. § 7607(b)(1) (1982). The only exception is for a petition "based solely on grounds arising after such sixtieth day." *Id.*

EPA action is not subject to challenge either on procedural [18] or substantive grounds [19] in any later proceeding, specifically including "civil or criminal proceedings for enforcement." [20] The EPA, in promulgating its interpretative rule, specifically invoked this preclusive review section,[21] and the court below accepted the determination.

Review by this Court to reaffirm the protection of the Due Process Clause in this setting is therefore especially urgent. If the May 30 rule is subject to the preclusive review provision, a motor vehicle manufacturer will be unable to argue in a later recall proceeding that the EPA unlawfully failed to use notice-and-comment rulemaking, that it imposed recall obligations on manufacturers not

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[18] *See id.* § 7607(d)(8).

[19] The legislative history of the 1977 amendments to the Clean Air Act makes clear that Congress intended the preclusion to apply to all challenges:

> [T]he committee wishes to reaffirm its intent to strictly limit section 307 challenges to those which are actually filed within that time. The only instance in which the committee intends that later challenges may be entertained by the court of appeals are those in which the grounds arise solely after the 60th day. Thus, unless a petitioner can show that the basis for his challenge did not exist or was not reasonably to be anticipated before the expiration of 60 days, the court of appeals is without jurisdiction to consider a petition filed later than 60 days after the publication of the promulgated rule.

H.R. Rep. No. 294, 95th Cong., 1st Sess. 322 (1977), *reprinted in* 1977 U.S. Code Cong. & Ad. News 1401. This aspect of the judicial review provision discussed in the Report was not altered during the legislative process. *See* H.R. Conference Rep. No. 564, 95th Cong., 1st Sess. 177-78 (1977), *reprinted in* 1977 U.S. Code Cong. & Ad. News 1558.

[20] 42 U.S.C. § 7607(b)(2) (1982). *See also id.* § 7607(e) (prohibiting other methods of judicial review of EPA regulations).

[21] It stated: "This rulemaking constitutes a 'nationally applicable regulation' under section 307(b)(1) . . . . Any judicial review of this action is, accordingly, governed by that provision." 45 Fed. Reg. 36396, 36398 (1980).

intended by Congress, or that the reviewing court improperly deferred to the agency action.[22] This Court has previously taken note of the serious due process concerns raised by preclusive judicial review statutes.[23] These constitutional concerns are surely raised by the circumstances of this case—where the rulings of the agency and court below coalesced to deny the affected parties any meaningful opportunity to present their views regarding an "interpretative rule" that vitally affects their interests.

II. THE COURT SHOULD REVIEW THE DECISION BELOW BECAUSE THE LOWER COURT IGNORED THE APA IN APPLYING THE *CHEVRON* STANDARD OF REVIEW TO A RULE THAT IT CHARACTERIZED AS INTERPRETATIVE.

Two separate errors of statutory construction that independently justify review by this Court caused the deprivation of the constitutionally protected procedural rights of the MVMA members and other affected parties. This part of the brief discusses the first: the D.C. Circuit's decision to review the May 30 interpretative rule under the *Chevron* standard. The court below overlooked the context in which the *Chevron* standard was developed, repudiated the longstanding and more rigorous standard of review applicable to interpretative rules, and thereby denied interested parties the rights guaranteed them by the APA. This Court should review the decision below in

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[22] Issues open for litigation would be the applicability of the narrow exception that Congress provided, that is, whether "the basis for [a] challenge did not exist or was not reasonably to be anticipated before the expiration of 60 days," the applicability of the preclusion to interpretative rules, and the constitutionality of the judicial review limitations. *See* note 23 *infra*.

[23] *See Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 592 n.9 (1980) (recognizing the "constitutional question" of due process raised by section 307(b) of the Clean Air Act but deferring resolution); *id.* at 594-95 (Powell, J., concurring); *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 289-91 (1978) (Powell, J., concurring).

order to resolve the conflict that has developed among the lower courts regarding the *Chevron* standard of review and to deny the applicability of *Chevron* to agency interpretative rules.[24]

Because of *Chevron*, the court below accorded great deference to "an administrative construction of a statute that the agency administers," [25] even though that construction was contained in an interpretative rule issued in the absence of prior notice and comment. The D.C. Circuit reasoned that

> reviewing courts should respect the policy choices of administrative agencies. *See Chevron*, . . . 104 S. Ct. at 2793-94. The question presented today is whether the agency's action is a reasonable one in light of the existing statutory constraints, and it is not the job of the courts to propose rules that they would prefer the agency to adopt.[26]

Inhibited by its own job description, the court never reached an independent judgment about a manufacturer's recall liability under the statute; it simply deferred on the ground that EPA's May 30 rule was a reasonable policy choice.

The lower court was incorrect in believing that *Chevron* required such deference to EPA's May 30 rule. *Chevron* was decided in the context of a rule subject to full notice-and-comment procedures and was premised on the fact that the agency had acted only after resolving the differing views on policy presented before the rule was

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[24] GM's petition describes the conflict among the circuits over the application of the *Chevron* standard of review to interpretative rules. *See* General Motors Corporation's Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit 26 (filed January 7, 1985) ("GM Petition").

[25] 742 F.2d at 1566.

[26] *Id.* at 1567 n.8.

adopted.[27] In these circumstances a high degree of deference to the agency entails no denial of due process to affected parties, who have received an opportunity to be heard before the agency. The court below failed to consider whether according such deference to an "interpretative rule" promulgated without any such opportunity was consistent with other decisions of this Court and the requirements of the APA.

In misapplying *Chevron*, the D.C. Circuit disregarded the standard of review for interpretative rules established by this Court in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). In *Skidmore*, this Court held that:

> the rulings, interpretations and opinions of the Administrator . . . while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Id. at 140. This Court has repeatedly reaffirmed the *Skidmore* test as the proper standard against which interpretative rules must be measured.[28]

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[27] *See Chevron*, 104 S. Ct. at 2787-90. In *Chemical Manufacturers Ass'n v. NRDC, Inc.*, 53 U.S.L.W. 4193 (U.S. February 27, 1985) (No. 83-1013), the Court applied the *Chevron* standard of review to another EPA regulation. That regulation, like the one in *Chevron*, was issued after full notice-and-comment rulemaking and reconciled competing policy concerns. *Id.* at 4195 n.10 (citing 43 Fed. Reg. 27736 (1978)), 4197-98. As a result, the Court in *CMA* did not address the questions presented in GM's petition.

[28] *See, e.g., FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37 (1981) (citing *Skidmore*); *General Electric Co. v. Gilbert*, 429 U.S. 125, 141 (1976) (*Skidmore* is "[t]he most com-

By uncritically substituting *Chevron*'s deference for *Skidmore*'s more rigorous criteria, the court below denied MVMA companies procedural rights protected by the APA. The APA, which embodies Congress' determination of what minimal procedural requirements must be satisfied to protect due process rights,[29] directs reviewing courts to subject interpretative rules to independent and close scrutiny. An interpretative rule is merely the agency's view as to the meaning of the statute it administers, and the APA specifically provides that "the reviewing court shall decide all relevant questions of law." [30]

The legislative history of the APA reflects the understanding that it would be fundamentally unfair for a rule to be promulgated in the absence both of notice and comment and of independent judicial scrutiny. The framers of the APA understood that legislative rules promulgated under congressionally delegated authority could properly be given binding effect because affected persons had an

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prehensive statement of the role of interpretative rulings"). *See also Chevron*, 104 S. Ct. at 2793 n.40 (citing *Skidmore* with approval).

[29] The framers of the APA intended the legislation to protect the purposes that animate the Due Process Clause. They called the APA "a comprehensive charter of private liberty and a solemn undertaking of official fairness. It is intended as a guide to him who seeks fair play and equal rights under law." Administrative Procedure Act: Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. iii (1946). *See also id.* at 217 (APA sets "the minimum requirements of fair administrative procedure"). The courts have also viewed the APA as protecting due process rights. *E.g., NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) ("The rule-making provisions of [the APA] . . . were designed to assure fairness and mature consideration of rules of general application"); *Bell Lines, Inc. v. United States*, 263 F. Supp. 40, 46 (S.D. W.Va. 1967) ("the requirements of the Administrative Procedure Act are fundamental to due process").

[30] Section 10(e) of the APA, 5 U.S.C. § 706 (1982).

opportunity to participate in the agency's rulemaking.[31] Interpretative rules, on the other hand, were exempt from notice-and-comment requirements precisely because "as merely interpretations of statutory provisions . . . [they] are subject to plenary judicial review, whereas 'substantive' rules involve a maximum of administrative discretion." [32]

The courts have consistently implemented the APA's requirements by reviewing interpretative rules under *Skidmore*.[33] Such scrutiny includes not only an independent judgment of the correctness of the agency position but also an examination of "whether the [agency's] action followed the necessary procedural requirements," [34]

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[31] *See* Report of the Committee on Administrative Procedure Appointed by the Attorney General, Administrative Procedures in Government Agencies 101-02 (1941).

[32] Administrative Procedure Act: Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 18 (1946).

[33] *E.g., CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102, 120 (1980) (finding CPSC interpretative rule to be "far from authoritative as an expression of congressional will under the oft-quoted factors enunciated in *Skidmore*," and deciding issue of statutory construction for itself); *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) (same in reviewing EEOC interpretation); *Morton v. Ruiz*, 415 U.S. 199, 237 (1974) (same in reviewing Bureau of Indian Affairs interpretation); *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 156 (1944) (pre-*Skidmore* case employing similar criteria, and refusing to defer to agency's interpretation of statute in context of general ruling on utility rates). *See also Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977) (citing *Skidmore* in dictum).

The lower courts have also long recognized that "under *Skidmore* the agency ultimately must depend upon the *persuasive power* of its argument. The simple fact that the agency *has* a position, in and of itself, is of only marginal significance." *Mayburg v. Secretary of Health and Human Services*, 740 F.2d 100, 106 (1st Cir. 1984) (substituting own interpretation of statute for agency's). *See also, e.g., Capitano v. Secretary of Health and Human Services*, 732 F.2d 1066, 1076 (2d Cir. 1984) (same).

[34] *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 417 (1971).

and the courts have not hesitated to invalidate a rule for improperly failing to follow notice-and-comment procedures.[35] Indeed, the court below had itself earlier recognized this duty:

> Even more so than our review of EPA's statutory interpretations, our review of its procedural integrity in promulgating the regulations before us is the product of our independent judgment, and our main reliance in ensuring that, despite its broad discretion, the [EPA] has not acted unfairly or in disregard of the statutorily prescribed procedures. Our assertion of judicial independence in carrying out the procedural aspect of the review function derives from this country's historic reliance on the courts as the exponents of procedural fairness.[36]

The lower court's failure to follow the APA by applying the *Chevron* standard in place of *Skidmore* seriously prejudiced MVMA member companies. By carrying deference to the point of "total abdication in construing the statute," [37] the court below failed to discharge its essential judicial obligations. It made no effort, of course, to assess the May 30 rule under the *Skidmore* criteria, which would have demonstrated that the rule did not deserve

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[35] *E.g., Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 171 (6th Cir. 1973) (vacating informal rulemaking and remanding for notice-and-comment procedures); *Detroit Edison Co. v. United States Environmental Protection Agency*, 496 F.2d 244, 249 (6th Cir. 1974) (same); *Lewis-Mota v. Secretary of Labor*, 469 F.2d 478, 482 (2d Cir. 1972) (same); *Cherry v. Mathews*, 419 F. Supp. 922, 924 (D.D.C. 1976) (same).

[36] *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027 (D.C. Cir. 1978) (citation and footnote omitted). The court also required assurances that the agency provide for public "participation commensurate with the complexity and intrusiveness of the resulting regulations." *Id.* at 1028 (footnote omitted).

[37] *General Electric Co. v. Gilbert*, 429 U.S. 125, 145 (1976) (rejecting deference to EEOC interpretative regulations).

the deference it received.[38] Further, the court below made no effort to determine whether EPA was authorized to issue the May 30 rule without prior notice and opportunity to comment. Had the court addressed that question, it would have concluded, as we now show, that EPA had a statutory duty to use notice-and-comment rulemaking before it could lawfully implement the May 30 rule.

III. THE COURT SHOULD REVIEW THE DECISION BELOW BECAUSE THE EPA VIOLATED THE APA AND THE CLEAN AIR ACT IN DENYING MEMBERS OF THE REGULATED INDUSTRY NOTICE OF AND OPPORTUNITY TO COMMENT ON A RULE ENLARGING THEIR RECALL OBLIGATIONS.

By promulgating the May 30 rule as an interpretation without following notice-and-comment procedures, the EPA violated its statutory duty, embodied in both the APA and the Clean Air Act itself, to use such procedures before issuing a rule expanding a manufacturer's recall obligations. Review by the Court therefore is necessary to correct this error and thereby avoid the constitutional issue otherwise raised by the actions of EPA and the court below.

As GM persuasively demonstrates in its petition, the May 30 regulation is a legislative rule, and the EPA violated the APA by issuing it without prior notice and comment.[39] EPA's so-called "interpretative rule" did not merely construe or interpret language in the Clean Air

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[38] The opinions in the court below show that review under *Skidmore* would have produced a different result. Judge Wald for the en banc majority applied *Chevron* and sustained the May 30 rule; Judge Bazelon in dissent applied *Skidmore* standards, 742 F.2d at 1573, and would have vacated the May 30 rule.

[39] *See* GM Petition 15-21. As noted above, the Clean Air Act incorporates the provision of the APA that exempts interpretative rules from notice-and-comment procedures. *See* note 13 *supra*.

Act; it embodied the agency's resolution of conflicting policy objectives.[40] Moreover, these policy choices were necessary because of gaps in the language of the statute that Congress intended the agency to fill pursuant to specific grants of rulemaking authority.[41]

The language and legislative history of the Clean Air Act eliminate any doubt that EPA was required to use notice-and-comment procedures before promulgating the May 30 rule. In 1977 Congress amended the Clean Air Act, specifying detailed procedural steps for EPA to follow before issuing a rule—such as providing notice of proposed rulemaking and opportunity for oral and written public comments [42]—and adding a section to the Clean Air Act that listed "the rules and actions to which such proce-

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[40] *See* 742 F.2d at 1567 n.8 (Wald, J.) (noting that the court "should respect the policy choices" of the EPA); *id.* at 1582 (Bazelon, J., dissenting) (disagreeing with the agency's and GM's interpretations of the statute and suggesting his own interpretation); *General Motors Corp. v. Ruckelshaus*, 724 F.2d 979, 999 (D.C. Cir. 1983) (Wilkey, J., concurring in the original panel decision) (saying four "interpretations of the statute appear to be possible").

Moreover, EPA apparently concedes that its interpretation needs further clarification to resolve open policy questions about the extent of a manufacturer's repair obligation. *See* 724 F.2d at 991-92 (discussing agency explanation that cars beyond their useful life would not need to be repaired to meet the same standards as newer cars).

[41] Section 202(d) requires EPA to prescribe regulations implementing the useful life definition "for purposes of" the recall and remedy provision. 42 U.S.C. § 7521(d) (1982). *See* Conference Rep. No. 1783, 91st Cong., 2d Sess. 49 (1970), *reprinted in* 1970 U.S. Code Cong. & Ad. News 5381 ("Administrator shall prescribe regulations to implement [the useful life] definition"). The recall and remedy provision then incorporates that definition by relating to nonconforming vehicles "when in actual use throughout their useful life (as determined under section 7521(d))." 42 U.S.C. § 7541(c)(1) (1982).

[42] Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 305, 91 Stat. 685, 772-77 (codified at 42 U.S.C. § 7607(d)(1)-(7) (1982)).

dures will apply." [43] This new section provided that the notice-and-comment procedures would govern the promulgation of rules implementing the provision on useful life [44] and the recall and remedy provision.[45] In explaining the EPA's duties under the new procedural requirements, Congress said: "In promulgating *any* rule referred to in this section," the EPA must respond "to the significant comments, criticisms and data submitted during the comment period" in sufficient depth "to show that the Administrator did consider public comments . . . and to permit any court reviewing the rule under section 307(b) to be fairly apprised of the basis for the Administrator's action." [46]

The intent of Congress in amending the Clean Air Act in 1977 to require legislative rulemaking for rules affect-

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[43] H.R. Rep. No. 294, 95th Cong., 1st Sess. 27 (1977), *reprinted in* 1977 U.S. Code Cong. & Ad. News 1105. This House Report provides the most comprehensive explanation for the 1977 amendments. The Senate passed a bill that differed from the House bill but, after a conference, agreed to the House bill with some changes not relevant here. *See* H.R. Conference Rep. No. 564, 95th Cong., 1st Sess. 177-78 (1977), *reprinted in* 1977 U.S. Code Cong. & Ad. News 1558.

[44] 42 U.S.C. § 7607(d)(1)(J) (1982) (procedures apply in the "promulgation or revision of regulations under section 7521").

[45] *Id.* § 7607(d)(1)(L) (procedures apply in the "promulgation or revision of any regulations promulgated under section [207] (relating to warranties and *compliance by vehicles in actual use*)" (emphasis added). At the conference between the House and Senate managers, the Senate persuaded the House not to apply the special procedures to EPA review of certain state action required under the Act. H.R. Conference Rep. No. 564, 95th Cong., 1st Sess. 177 (1977), *reprinted in* 1977 U.S. Code Cong. & Ad. News 1558. This legislative history demonstrates that Congress specifically considered the sorts of agency action that should be covered by the notice-and-comment procedures and concluded that the procedures were to be used in the recall area.

[46] H.R. Rep. 294, 95th Cong., 1st Sess. 321 (1977), *reprinted in* 1977 U.S. Code Cong. & Ad. News 1400 (emphasis added).

ing a manufacturer's recall liability was to prevent just what happened here—a complete exclusion of interested parties from the decisionmaking process. Congress intended "to insure more effective, informed public involvement in decisionmaking under the Act" and to establish "procedural rights and opportunities for public participation in the rulemaking process." [47] The House Interstate and Foreign Commerce Committee, which initiated the bill that later was substantially adopted, had found that EPA's rulemaking procedures were "inadequate" and "needed to be remedied." The Committee stated:

> [A]ppropriately broad administrative discretion to promulgate regulations to protect health or the environment must be restrained by thorough and careful *procedural safeguards that insure an effective opportunity for public participation in the rulemaking process.*[48]

Against this background of congressional intent and action, there is no doubt that the EPA breached its statutory mandate in issuing the May 30 rule without first following notice-and-comment procedures. The rule reflects precisely the kind of agency judgments that should have been informed and enlightened by the full participation of interested parties, and the lower court erred in unduly deferring to the agency's decisionmaking process.

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[47] H.R. Rep. No. 294, 95th Cong., 1st Sess. 2, 27 (1977), *reprinted in* 1977 U.S. Code Cong. & Ad. News 1079, 1105.

[48] *Id.* at 319, *reprinted in* 1977 U.S. Code Cong. & Ad. News 1398 (emphasis added).

CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari to review the decision of the District of Columbia Circuit.

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